

file

**BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application of)	
Jack Bischoff for a Permit to Place)	
Fill Material in a Wetland for Residential)	3-SE-93-556
Development, City of Franklin, Milwaukee)	
County, Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mr. Jack Bischoff, 3605 West Maryland Avenue, Phoenix, Arizona, 85019, completed filing an application with the Department of Natural Resources (the DNR or the Department) for water quality certification pursuant to sec. 401, Clean Water Act, and Ch. NR 299, Wis. Admin. Code. Certification was requested to place fill material for residential development in wetlands adjacent to a tributary to the Root River. The proposed project is located at 7133 West Ryan Road, in the NW 1/4 of Section 27, Township 6 North, Range 21 East, City of Franklin, Milwaukee County.

The Department denied the application as outlined in a letter dated October 20, 1993.

On November 23, 1993, the Department received an appeal and request for contested case hearing from Jack L. Bischoff, by his attorney Robert B. Fennig.

On December 7, 1993, DNR Secretary George E. Meyer granted the request for a contested case hearing pursuant to sec. 227.42, Stats.

On January 10, 1995, DNR forwarded the file to the Division of Hearings and Appeals for hearing. The case was originally scheduled for hearing on February 7, 1995. The case was rescheduled and postponed several times at the request of the applicant.

Pursuant to due notice hearing was held on February 28, 1996 at Milwaukee, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Jack Bischoff, and

The Estate of Ervin Etzel, c/o Mark Etzel, by

Robert B. Fennig, Attorney
1124 West Wells Street
Milwaukee, Wisconsin 53233-2303

Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. The co-applicants in this matter are Jack Bischoff and Mark Etzel for the Estate of Ervin Etzel. The co-applicants jointly own property located at 7133 West Ryan Road in the City of Franklin, with the legal description in the NW 1/4 of Section 27, Township 6 North, Range 21 East, City of Franklin, Milwaukee County. The co-applicants have owned the subject property since 1969.

2. The proposed project involves the filling of wetland areas for the construction of multi-unit housing. The proposal as it currently stands would involve the construction of a total of 44 units, most likely in the form of 22 separate two-story duplex buildings. The fill area would be approximately 4.85 acres in size, according to the application. However, this estimate appears high given the DNR determination that some 1.6 acres of the 5.5 acre parcel is buildable upland area. Further, Southeastern Wisconsin Regional Planning Commission (SWRPC) Chief Biologist Donald Reed made a field inspection of the property on July 22, 1993, and December 23, 1993. In his field report, Reed described the wetland portion of the site as approximately 4.0 acres. (Ex.17)

The site would be filled and graded so that the finished elevation at the north end of the property would be equivalent to the existing elevation of 699. The south end of the property would require approximately four feet of fill to bring the elevation to 694, creating a slope of one foot along one hundred feet. The project would require approximately sixteen thousand cubic yards of fill material which the co-applicants hope to obtain from local utility and road construction projects.

3. A significant portion, well over fifty percent, of the applicant's property is zoned as conservancy by the City of Franklin. All parties agree that the C-1 zoning for the conservancy is land which could not be built upon under City of Franklin Ordinance, as no structures are allowed except those accessory to a permitted use. (Ex. 9) However, it appears that the C-1 zoning could be used for purposes of density analysis. With respect to density analysis the co-applicants expect to have approvals for forty-four total housing units on the subject property. Reed concluded that, based upon his experience in dealing with City officials, the City of Franklin would not permit filling in the area designated as conservancy. It should be noted that the conservancy zoning far precedes the Department's adoption of the water quality standards for wetlands. Exhibit 10 was prepared as an official zoning map of the City of Franklin on May 18, 1982. The city zoning was in effect at that time.

4. A significant portion of the applicant's property is classified as wetland on the Wisconsin Wetland Inventory map. The plant life at the site is consistent with wetlands, and is dominated by Reed canary grass, with both broad-leaved cattail and narrow-leaved cattail, prairie cord grass, Redtop, Tussock sedge, American elm, weeping willow, swamp rose and green ash. Hydric soils, mostly silty and loamy materials, are present in the area. (Ex. 19) There is no serious dispute that a large portion of the subject property, approximately 4 acres, is wetland within the meaning of Wisconsin law.

5. A clear preponderance of the credible evidence, including all the expert testimony, indicates that the filling of the proposed project would have direct detrimental impacts on wetland functional values, water quality and the environment. Reed testified that filling the wetland areas of the parcel as proposed would result in a significant adverse impact to the functional values of water quality, wildlife habitat, and discharge function of wetlands. Reed further testified that there would be significant detrimental secondary impacts as a result of the proposed fill. Filling the area could render the entire drainage system in the area unstable, resulting in wet basements in the area and seepage which could cause other areas which are currently upland to become wetland. Department Water Regulation and Zoning Engineer Lynn Torgerson concurred that adverse impacts to wildlife, water quality and storm and flood water storage would result from filling of the wetlands at the site.

6. Construction of a housing project is not a wetland dependant activity under Wisconsin law because a wetland or water is not necessary to fulfill the overall purpose of construction of multi-unit housing projects.

7. Torgerson visited the site and took numerous photos of the area. (Exhibit 22 a-g) Torgerson made a rough estimate of upland areas available for construction without filling of any wetlands in the area. The co-applicant's property contains 1.6 acres of uplands out of a total parcel of approximately 5.5 acres. (Ex. 26) Torgerson also concluded that it was likely that the City of Franklin would authorize road construction in a narrow band in the conservancy.

The Department witnesses suggest that the applicants build on the upland areas of their property as a practical alternative to the proposed fill. The co-applicants assert that it is impractical to build on the upland areas of the property, as this area would not be suitable for the scale of housing proposed by the co-applicants and this area is not served by City of Franklin sewer at this time. Further, if the area is to be served by city sewer a significant cost would result to the developers of the parcel. The co-applicants assert that these costs make development of a smaller scale housing project at the site impractical. However, the overall project purpose of the construction of multi-unit housing could be served by construction on upland areas of the property. The record on the costs relating to extension of sewer lines is not sufficient to carry the project proponent's burden of proof that no practical alternative exists to filling in wetland areas. Further, the proposed project on its face is not

practical because it involves construction in an area zoned conservancy by the City of Franklin. The applicant apparently mistakenly believed that the C-1 zoning designation meant "commercial" rather than "conservancy". There is absolutely nothing in the record that indicates that the City would allow construction in an area so zoned. In this sense, the Department's suggestion of building solely on upland areas and seeking a variance to construct a road through the conservancy is more practical than the proposed massive filling of the wetland complex in the area.

Taken as a whole a clear preponderance of the credible evidence supports a finding that the applicant has not carried its burden of proof in proving that there are no practical alternatives available which will not adversely impact wetlands or result in other significant adverse environmental consequences. The co-applicants could clearly build on upland areas at the site. While the co-applicants may prefer to fill in wetland areas at the site, it is clear that there is a substantial area of buildable land at the site.

8. The subject property is located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code. The parcel is listed as a primary environmental corridor by SWRPC designation. The concentration type and size of the wetland in the area constitute an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code. The project proponent has not shown why filling in this area is appropriate or necessary given the clear evidence that significant detrimental impacts to the functional values of the wetlands in this area would occur.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats. and NR 299.05(6), Wis. Admin. Code.

2. The proposed fill for residential development is not a wetland dependent activity within the meaning of sec. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code because construction of multi-unit housing is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. Practical alternatives to the proposed fill exist which will not adversely impact wetlands and will not result in other significant environmental consequences. See, sec. NR 103.08(4)(a)(2), Wis. Admin. Code. Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Sec. NR 103.07(1), Wis. Admin. Code. Taking the above factors into consideration, the applicant has not shown why he could not construct housing on upland areas on the site.

4. The project does not meet the requirements of sec. NR 103, Wis. Admin. Code because the project is not wetland dependent and because practical alternatives which will not adversely impact wetlands and will not result in significant adverse environmental consequences. Sec. NR 103.08(4)(a), Wis. Admin. Code.

5. The proposed project meets the conditions of sec. NR 103.08(4)(a) because it is not wetland dependent and because a practical alternative exists as described above. For all activities which do not meet the conditions in par. (a), the department, utilizing the factors in sub. (3)(b) to (f), shall determine whether the project proponent has shown that the activity will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences.

6. The proposed project would result in the violation of the standards contained in NR 103.08(3)(b) to (f), Wis. Admin. Code, specifically NR 103.08(3)(b) relating to practical alternatives, NR 103.08(3)(c) relating to the maintenance and protection of wetland functional values described in NR 103.03, and NR 103.08(3)(d) relating to cumulative impacts.

7. The subject property is located within an area of special natural resources interest within the meaning of NR 103.04, Wis. Admin. Code.

ORDER

IT IS HEREBY ORDERED, that the application for water quality certification be DENIED.

Dated at Madison, Wisconsin on March 21, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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Madison, Wisconsin 53705
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.